

Central Intelligence Agency



Washington, D.C. 20505

OLL 84-1245
28 March 1984



Mr. Michael J. O'Neil
Chief Counsel
Permanent Select Committee on Intelligence
House of Representatives
Washington, D.C. 20515

Dear Mike:

Enclosed are the Agency's suggested comments to your proposed amendment to the revision of H.R. 4681 drafted by Congresswoman Schroeder's staff. As [redacted] indicated in your earlier conversation, we believe that your proposed amendment is a vast improvement over the Civil Service Subcommittee's revision. The Agency, however, has two principal concerns with your proposed amendment.

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Our first concern relates to the definition of "covered employee" contained in your proposed amendment. Under the present definition, a distinction is drawn between employees at the Department of Defense (DOD), the Federal Bureau of Investigation (FBI) and the Federal Emergency Management Agency (FEMA), and employees at other covered agencies. Any employee at DOD, FBI or FEMA having access to either cryptographic or special access program information is considered a covered employee, whereas employees at other covered agencies are considered covered employees only if they have access to cryptographic information. Because the harm which may result from unauthorized disclosure of either type of information is identical, we do not see any reason to distinguish between access to cryptographic or special access program information in terms of requiring prepublication review or polygraph examinations.

The second concern also relates to the definition of covered employee, and the requirement that individuals must have "regular and continuous" access to covered information to qualify as such employees. In authorizing an individual access to such information, an agency is, in effect, permitting an employee to have regular and continuous access to such information. It is difficult, if not impossible, for an agency to anticipate whether an individual's access to information will be regular and continuous once a clearance is granted in most cases. Given this fact, and the requirement of notification of covered employees contained in your proposed

amendment, we believe that the implementation and possible resulting litigation problems that would result in attempting to delineate "regular and continuous" access are considerable. We thus would suggest that the words "regular and continuous" be deleted in defining the type of access which would qualify individuals as covered employees.

Other suggested changes to your proposed amendment are indicated directly on the draft enclosed herein.

With respect to the Civil Service Subcommittee's revision, we had one suggestion with respect to the exemption which was afforded the Agency, which we provided directly to Andy Feinstein. The exemption in the Subcommittee revision was limited to individuals employed by or detailed to the CIA, as well as experts, consultants and applicants to this Agency. Because the Agency distinguishes between detailees and assignees, we felt that the exemption should specifically include individuals who are "assigned to" the Agency. Mr. Feinstein, in our conversation, agreed to amend the exemption to accommodate this concern.

We very much appreciate the opportunity to comment on your proposed amendment and will be happy to provide whatever further assistance you may require in this matter.

Sincerely,

[Redacted Signature]

Chief, Legislation Division
Office of Legislative Liaison

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Enclosures

DISTRIBUTION:

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1 - OLL Chrono
✓ 1 - LEG File: Polygraphs
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1 - OS [Redacted]
1 - ALD/OGC [Redacted]

SWH:csh (28 March 1984)

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INSTRUCTIONS: Additions are bracketed; Deletions are lined-out.

"(A) the term 'covered agency' means the Department of Defense, the Federal Bureau of Investigation, the Federal Emergency Management Agency, and any other agency (other than the Central Intelligence Agency or the National Security Agency) which employs individuals in positions the ~~primary~~ duties of which ~~involve cryptographic communications or technology~~; [require access to covered information;]

"(B) the term 'covered employee' --

~~"(i) as used with respect to the Department of Defense, the Federal Bureau of Investigation, or the Federal Emergency Management Agency,~~ means an individual employed by or [assigned or] detailed to ~~the~~ [a covered] agency, an individual applying for a position in the [a covered] agency, and an expert or consultant under contract with [a covered] ~~the~~ agency, who [is granted] ~~has regular and continuous~~ access to covered information as such an employee (or, in the case of an individual applying for a position, would ~~have~~ [be granted] such access to covered information in such position); ~~and~~

~~"(ii) as used with respect to any other covered agency, means an individual employed by or detailed to the agency, an individual applying for a position in the agency, and an expert or consultant under contract with the~~

~~agency, who so has (or would so have) regular and continuous access to covered information within the meaning of subparagraph (C)(ii), and~~

"(C) the term 'covered information' means ~~particularly sensitive~~ classified information --

"(i) subject to a special access program established [to protect intelligence sources and methods] in accordance with the provisions of section 4.2(a) of Executive Order 12356, [or pursuant to predecessor authorities and] as in effect on the effective date of the Federal Polygraph Limitation and Anti-Censorship Act of 1984; or

(ii) concerning cryptographic communications or technology.

"(2) Under regulations [prescribed] ~~issued~~ by the ~~President~~, [the Director of Central Intelligence with respect to covered information described in paragraph (C)(i) and the Secretary of Defense with respect to covered information described in paragraph (C)(ii)], the head of a covered agency ~~may~~ [is authorized to] impose the special security procedures specified in paragraph (3) or (4), or both, with respect to a covered employee of such covered agency. [Nothing in section 7364 of this title shall create any civil liability for the United States, any department or agency thereof, or any officer or employee thereof in official or personal capacity for implementing regulations promulgated under this paragraph.]

"(3) (A) A covered agency ~~may~~ [is authorized], as a condition for access to covered information, [to] require a covered employee to enter into an agreement requiring the individual to submit for prepublication review those portions of any writings of such individual which [purport to contain covered information or which] such individual ~~reasonably believes~~ [knows certain covered information or has reason to believe] might contain covered information. [The covered agency is authorized to take any administrative steps and any legal steps it deems appropriate to ensure employee execution of compliance with such an agreement.]

"(B) Nothing in section 7363 of this title shall ~~prevent the enforcement of an agreement requiring prepublication review as described in subparagraph (A)~~ [apply to a covered agency implementing regulations promulgated under paragraph (b) (2).]

"(4) A covered agency ~~may~~ [is authorized], as a condition for access to covered information, [to] require a covered employee to submit to a polygraph examination, subject to the following conditions:

"(A) The head of a covered agency may require a covered employee to submit to a polygraph examination only if the agency head ~~determines, in writing,~~ [makes a written determination, in his sole and unreviewable discretion,] that such covered employee has (or, in the case of an applicant, would have) access to covered information, the unauthorized disclosure of which could reasonably be expected to result ~~directly~~ in the loss of --

(i) human life;

(ii) intelligence sources or methods which are ~~vital~~ [important] to the fulfillment of national security requirements or which provide ~~a unique~~ [an essential] capacity to intelligence agencies of the United States; or

(iii) technologies, plans, or procedures ~~vital~~ [important] to the strategic advantage of the United States.

"(B) A polygraph examination under this paragraph --

"(i) shall be limited to questions designed to ascertain whether the covered employee has

~~committed, is committing, or intends to commit espionage against the United States,~~ [acted, is acting, or intends to act on behalf of a foreign power; or the covered employee has disclosed or intends to disclose classified information to agents of a foreign power or other unauthorized persons.] and

"(ii) may be administered only as provided in section 7362(b)(2) of this title.

"(C)(i) A covered agency may not take or threaten to take any action against a covered employee, or fail to take or threaten to fail to take any action on behalf of a covered employee, on the basis of any inference or determination (referred to in section 7361(4) of

this title) made from that individual's performance in the course of a polygraph examination, unless the appropriate agency head personally ~~determines, in writing,~~ [makes a written determination, in his sole and unreviewable discretion] that a decision not to carry out the measure concerned would pose an unacceptable risk to national security.

"(ii) For purposes of clause (i), the term 'measure concerned' means the taking or threatening to take an action against a covered employee, or the failing to take or threatening to fail to take an action on behalf of a covered employee, as referred to in such clause.

"(5) (A) Before placing an individual in a position which is subject to the special security procedures specified in paragraph (3) or (4), or which the covered agency, with reasonable certainty, anticipates will be made subject to such procedures during the individual's expected tenure, such agency shall --

"(i) provide written notice informing the individual --

"(I) of the fact that the position is subject to those procedures, or

"(II) of the agency's intention to make the position subject to those procedures (including the anticipated effective date)

as the case may be; and

"(ii) provide to such individual a copy of the then-current regulations under paragraph (2) which apply to such position, or which would apply to such position if it were then so subject to those procedures, as the case may be.

"(B)(i) Notwithstanding any other provision of law, the failure of an individual described in clause (ii) to comply with any of the special security procedures specified in paragraph (3) or (4) may serve as the basis for denying or withdrawing clearance for access to covered information for purposes of any decision concerning separation, a reduction in grade or pay, or other action against such individual, [unless or until the individual receives notice under subparagraph (a)(1)(II).]

"(ii) An individual shall be considered to be an individual described in this clause if such individual --

"(I) is holding a position as of the date on which it first becomes subject to any of the special security procedures specified in paragraph (3) or (4); and

(II) was afforded no advance notice under subparagraph (A)(i)II) with respect to such position.

"(6) The President shall submit to ~~each House of the Congress~~ [the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence] for each calendar year beginning after the effective date of the Federal Polygraph Limitation and Anti-Censorship Act of 1984 a [classified] report which shall include --

"(A) a list identifying each agency which was a covered agency during any part of the year;

"(B) the number of covered employees within each such agency during such year;

"(C) the number of covered employees, in the aggregate and by agency, required to enter into an agreement under paragraph (3) during such year;

"(D) the number of covered employees, in the aggregate and by agency, subject to any agreement under paragraph (3) during such year;

"(E) the number of writings submitted during such year in accordance with any agreement entered into under paragraph (3); and

"(F) the number of covered employees, in the aggregate and by agency, required to submit to a polygraph examination under paragraph (4) during such year."

Page 9, in the matter after line 8 and before line 9, strike out the item relating to section 7365 and insert in lieu thereof the following:

"7365. Exceptions."

Page 9, strike out line 20 and all that followed thereafter through page 10, line 2, and insert in lieu thereof the following new subsection:

(b) Nothing in subsection (a) applies with respect --
 (1) to the Central Intelligence Agency or the
National Security Agency, or to any agreement which
requires prepublication review by either of those agencies;
or

(2) to --

 (A) a covered agency, as defined in subsection
 (b) of section 7365 of title 5, United States Code (as
added by this Act) with respect to any agreement which
requires prepublication review by such covered agency,
but only to the extent that such agreement would be
permitted under paragraph (3) of such subsection; or

 (B) any such agreement, to such extent.